In the Supreme Court of the United States

OCTOBER TERM, 1969

No. 1593

JOSEPH LEE NOLAN AND SAMUEL F. COMEAUX,
PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FIFTH CIRCUIT

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the court of appeals (Pet. App. A) is reported at 420 F. 2d 552.

JURISDICTION

The judgment of the court of appeals was entered on December 29, 1969. A petition for rehearing was denied on April 20, 1970. The petition for a writ of certiorari was filed on May 20, 1970. The jurisdic-

tion of this Court is invoked under 28 U.S.C. 1254 (1).

QUESTION PRESENTED

Whether, under the circumstances of this case, the postponement until after trial of a hearing on possible taint from wiretapping and electronic surveillance deprived petitioners of a fair trial.

STATEMENT

Petitioners were convicted, after a jury trial in the United States District Court for the Eastern District of Louisiana, on three counts stemming from a scheme to bribe participants in order to influence the outcome of football games in 1966 (R. 1-5). On December 6, 1968, petitioner Nolan was sentenced to imprisonment for four years, and petitioner Comeaux to imprisonment for three years; Nolan was also fined $10,000.[1] The convictions were affirmed upon appeal.

The sole issue raised in the instant petition relates to the manner in which the trial court handled the issue whether electronic eavesdropping may have tainted the trial. Before trial, petitioners moved for discovery of the tapes. In light of the government's assertion that no evidence pertaining to the offenses charged came from a tainted source, and in view of the extensive materials involved, the court postponed a hearing on the question of taint until after trial

[1] A co-defendant, Graziano, pleaded guilty to all three counts and was given concurrent one-year sentences on each (see Pet. App. 11).

(R. 101-110). After the trial, the government turned over to the defense 42 reels of tape with over 90 hours of listening time (R. 799-800).[2] Two and one half months later, the court held a post-trial suppression hearing at which time both the prosecutor and the FBI agent who had conducted the investigation testified that they had not received any information from any wiretapping or electronic surveillance (R. 818, 822-823, 962-963). They also both testified that the case against petitioners originated from untainted sources (R. 836-837, 951-952). At the hearing petitioners' counsel failed to specify which tapes he contended tainted the government's case. After the hearing and after it had examined the extensive tapes, the court concluded that the government's case was not tainted by the overhearing (R. 53-55, 999-1000).

ARGUMENT

The district court, confronted with the prospect of a protracted hearing on the question of taint and relying on the representation of government counsel that its case was not tainted (R. 104), properly exercised its discretion in reserving the hearing on this issue until after the verdict. *United States* v. *Birrell*, 269 F. Supp. 716 (S.D.N.Y.). Petitioners, who make no claim that any taint was actually established at the post-trial hearing, nevertheless argue that the procedure followed was unfair since it allegedly violated their rights to discovery of their own

[2] Defense counsel had an opportunity to examine some of the tapes in connection with other prosecutions.

statements accorded by Rule 16, F. R. Crim. P. That rule provides, however, for discovery of "relevant" statements—*i.e.*, those bearing on the charge or a defense thereto. Here there was a reasonable basis for the trial court to conclude preliminarily that it was unlikely that any of the overhearings were in any way relevant to the charges at issue. Thus, it was not obliged to grant pre-trial discovery but could legitimately defer consideration of the issue of taint until after verdict. And since after trial it was established that the government's evidence was not in fact tainted by the overhearings, it is clear that petitioners were not prejudiced by the procedure adopted by the trial court. Nothing in *Alderman* v. *United States*, 394 U.S. 165, precludes such an approach, as the court of appeals correctly recognized (see Pet. App. 12-15).

CONCLUSION

For the reasons stated, the petition for a writ of certiorari should be denied.

Respectfully submitted.

ERWIN N. GRISWOLD,
Solicitor General.

WILL WILSON,
Assistant Attorney General.

BEATRICE ROSENBERG,
SIDNEY M. GLAZER,
Attorneys.

JUNE 1970.

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